72-1423

FILED
APR 19 1973
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1972

No. 72-1423

JOHN CAMPOPIANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 565-6377 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

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In The

Supreme Court of the United States

October Term, 1972

JOHN CAMPOPIANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Preliminary Statement

Petitioner, John Campopiano, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered March 20, 1973, (Docket No. 71-1280), which affirmed, on remand from this Court, his conviction for receiving, concealing and facilitating the transportation and concealment of heroin, knowing the same to have been illegally imported in violation of 21 U.S.C. §§173, 174, after a jury trial in the Southern District of New York (No. 70 CR 21).

The judgment of the Court of Appeals entered on July 2, 1971 and reported at 446 F.2d 869 was vacated by this Court on June 26, 1972 and the case

was remanded to the Court of Appeals for further consideration in light of Barker v. Wingo, 407 U.S. 514 (1972).

Opinion Below

The opinion of the Court of Appeals, not yet reported, is set forth as Appendix A (1b).[1]

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is granted pursuant to 28 U.S.C. §1254(1).

Constitutional Provisions

"No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law; . . ." United States Constitution, Amendment V.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." United States Constitution, Amendment VI.

Issues Involved

1. Were the standards enunciated by this Court in Barker v. Wingo, 407 U.S. 514 (1972) correctly applied by the Court of Appeals?

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1. Page reference "b" in parenthesis refer to pages of the Appendix following this petition.

Issues Involved

2. Should the case have been remanded to the District Court for a further hearing and decision by the Trial Judge in light of Barker v. Wingo, supra?

Statement of Facts

The relevant facts with regard to the issues raised by Barker v. Wingo are as follows: On July 6, 1967, a complaint was filed by Agent Charles J. Leya, Jr., charging the defendant, John Campopiano, and another, Leo Guarino, with violating, on July 5, 1967, Sections 173 and 174 of the United States Code (258a).[2] Nine months later, on April 6, 1968, the defendant, John Campopiano, was arrested at his home (14a). On January 12, 1970, twenty (20) months after his arrest, the defendant was indicted and charged alone with violating Sections 173 and 174 of the United States Code (6a).

Defendant moved on January 23, 1970, to dismiss the indictment on the ground that the delay between the filing of the complaint and his arrest, together with the delay between arrest and indictment had unfairly prejudiced the preparation of his defense or for a hearing to determine the cause of delay (7a). In support of that motion, defendant submitted the affidavit of his attorney and his own affidavit alleging that because of the aforesaid delays his memory was so impaired that he could not account for his whereabouts on the date charged in the indictment and further

2. All page reference "a" in parenthesis refer to pages in the Appendix on Appeal previously filed in the Court of Appeals.

that the Government had, during the twenty (20) months between his arrest and indictment, materially changed the substance of its charge causing him severe prejudice (9a). The defense which he had prepared to meet the charge in the complaint was no longer relevant since the indictment no longer charged him with commission of the offense with another, Leo Guarino, but instead charged him with commission of the offense alone (14a). In addition, the defendant alleged that his personal and business diary which he kept during 1967 and which contained a record of his business and social engagements during 1967 had been disposed of prior to the date of his arrest in April, 1968 (15a). That diary would have aided him to establish a defense through the use of the names, dates and places recorded therein (15a).

The defendant was not arrested until April 6, 1968 (157a). On July 6, 1967, however, the Government filed a complaint (Defendant's Exhibit A), sworn to by Agent Charles J. Leya, charging the defendant and another Leo Guarino, with a violation of Sections 173 and 174 of the United States Code (69a). That complaint stated that Agent Leya had observed both defendant and Leo Guarino in possession of narcotics on July 5, 1967 (Defendant's Exhibit A).

From July 5, 1967 until April 6, 1968, the date of defendant's arrest at his home, no Government agent went to his apartment to inquire his whereabouts (141a-142a). The first time they did they found him home, the day he was arrested (142a).

The defendant denied committing the crime charged in the indictment (157a). He did not remember where he was on July 5, 1967 (157a). After he was arrested in April of 1968 he attempted to determine through neighbors, friends and business associates where he might have been on July 5, 1967 (158a). He determined that he was not with Leo Guarino, however, because Leo Guarino was away on vacation with his wife during July (159a). The records of his employer, T & S Construction Company did not aid his memmory (160a). There was a record, however, which he possessed during the year 1967 which would have aided his memory and his defense (160a). A personal diary which he kept contained the record of his business appointments, dinner engagements and what he did daily and his day and evening appointments (161a). He did not have the 1967 diary when he was arrested in April, 1968, since he had discarded it in January or February of 1968 (161a).

The defendant's memory concerning where he was on July 5, 1967, was not any better in January, 1970, when he was indicted, than when he was arrested in April of 1968 (161a). His memory on the date of trial was not any better than it was in January, 1970 or April, 1968 (161a).

The defendant began working at T & S Construction Company on July 1, 1967 (172a). He started work at T & S then because his father-in-law, the owner of T & S had a heart attack in June, 1967 (172a).

During the period July 5, 1967, to the date of his arrest the defendant did not leave the City of New York for an extended period of time (171a). He continued to work during this period at T & S Construction Company as an estimator (171a).

During 1967, events occurred with regard to his family which he recalled (171a). In November of 1967, his mother died and he was present at her wake (171a). The defendant's five month old son was hospitalized suffering from near fatal pneumonia during a ten day period in November, 1967 (172a). He visited his son at Mt. Sinai Hospital during his son's hospitalization (172a).

Louise Salerno, the defendant's mother-in-law and wife of the owner of T & S Construction Company, produced evidence (Defendant's Exhibits F & G) which indicated that the defendant was employed and paid by T & S Construction from July 1, 1967, through the entire year of 1968 (158a).

Argument

I.

APPLICATION OF BARKER v. WINGO, REQUIRES DISMISSAL OF THE INDICTMENT.

The rule announced by the this Court in Barker, supra, "is a balancing test, in which the conduct of both the prosecution and defendant are weighed." Each speedy trial case must be approached on an ad hoc basis. Although the Court delineated four

factors — length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant — to be considered in deciding a speedy trial claim, it was careful to point out that:

> "[W]e regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant."

Length of delay. Defendant was arrested nine months after a complaint was filed against him. The crime charged was far from a serious, complex conspiracy charge. It was in fact an ordinary street crime, as measured by its operative facts — whether or not the defendant was at a particular place at a particular time. As such, a delay of nine months would seem not to be tolerated under Barker. In fact, the First Circuit considered a nine month delay overly long where the prosecution rested on eye-witness testimony. United States v. Butler, 426 F.2d 1275 (1970).

The reasons for delay. The defendant's uncontradicted assertion was that during the nine month delay between the filing of the complaint and his arrest, he was living at home attending to his normal occupation. He supported these assertions by work records of his employer and through his testimony that during this period he was

at his son's bedside in the hospital and present during his mother's wake and funeral. The government asserted that the defendant was a fugitive. Its evidence tending to prove that was non-existent at the trial and on the motion for dismissal made prior to trial the government alleged in an affidavit that information was received that the defendant was aware that he was wanted and he had taken precautions to avoid arrest. Never, not once during the period of delay, did any government agent knock on the door of defendant's home, although his home address was known to the agents.

Although defendant cannot argue that the facts compel a conclusion of a deliberate government attempt at delay, it most certainly can be argued and is so argued here that the agent's failure to ascertain whether defendant was home was a grossly negligent act. The government submitted no evidence at trial which justified the agent's failure to knock on defendant's door. The testimony that surveillance of defendant's home and a bar was made on altogether fifteen (15) occasions in nine months is supportive of defendant's claim, since the government was careful at trial not to elucidate the dates or times of the surveillances, thus forcing the Court to speculate that the surveillance was made at an hour when it was reasonably likely to observe the defendant and to further speculate how long the surveillance lasted on each of the fifteen (15) occasions.

The defendant's assertion of his right. The defendant first asserted his right immediately after indictment and moved for dismissal of the indict-

ment or an evidentiary hearing to determine the cause of the delay. That motion was denied prior to trial by the trial Judge without opinion and without a finding of fact. Defendant's renewal of the motion at trial was similarly denied.

> "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the right is being deprived." Barker, supra.

Prejudice to the defendant. Barker, recognized that prejudice is sometimes the most difficult factor to identify. "Loss of memory . . . is not always reflected in the record because what has been forgotten can rarely be shown." But defendant did not rely solely on loss of memory. His diary which would have aided his recollection was missing at the time of his arrest. This can hardly be called speculative evidence by anyone used to keeping a daily diary for it is immeasurably useful in recalling events.

Defendant's reliance upon the charge in the complaint that he was observed with Leo Guarino in possession of narcotics is hardly misplaced as the government has argued. Prior to indictment this was the only defense he had and he certainly had a right to rely on a sworn statement of a public officer. After indictment, when he was charged alone with possession, he was left with no defense except to claim deprivation of his right to a speedy trial — which he promptly did.

Argument

The government on its closing argument to the jury argued that both Guarino and defendant could have been in possession on July 5 — Guarino in constructive possession and defendant in actual possession. The argument might have held water if Agent Leya, the agent who swore to the complaint, had testified at the trial and put forward that thesis. (None of the other agents knew anything about Guarino and so testified at the trial). Moreover, the exact words of the complaint typed in addition to the boiler plate form of complaint damn the government's argument. The complaint read as follows:

> "On or about the 5th day of July, 1967, in the Southern District of New York, JOHN CAMPOPIANO and LEO GUARINO, the defendants . . . did receive . . . heroin. . . .
>
> The basis for deponent's knowledge and for the foregoing charges are, in part, as follows:
>
> Investigation made by him in the course of his official duties, including observations of the above named defendants in possession of the above mentioned drug" (18a).

Agent Leya observed Guarino in possession on July 5, 1967. He said it, no one else did. Any other forced reading flies in the face of plain English. Defendant's reliance on Guarino's whereabouts was natural and understandable. What is unanswered and not to be understood is the government's switch from complaint to indictment. Clearly the change prejudiced defendant.

Argument

Counsel cannot imagine that if this Court were faced with a situation where a uniformed police officer had witnessed a hold-up by men he knew, chased the perpetrators, filed a complaint alleging two hold-up men and failed to go to their homes to arrest them for nine months — that it would not inquire deeply into the matter and the reason for the delay in arrest. And if it further appeared that on the trial of that crime the alleged victim testified that there was one assailant and the officer failed to testify — would this Court conclude that no prejudice resulted if the defendant had relied on a defense of his previous co-defendant but was forced to go it alone at trial? That, it seems to counsel, is the exact situation in the instant case and compels one of two alternative dispositions.

II.

THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER CONSIDERATION IN LIGHT OF BARKER v. WINGO.

The standards used by the District Court to decide defendant's motions to dismiss the indictment on the grounds of failure to provide a speedy trial were not the standards enunciated in Barker v. Wingo, supra. One instance of variation between standards used by the District Court and Barker is the question of whether the defendant was required to demonstrate purposeful delay on the part of the Government or was negligent delay sufficient taken together with other circumstances.

Argument

Although the reasons for the District Court's denial are nowhere spelled out the Court of Appeals in its first decision, 446 F.2d at 869, stated: "There was no showing of deliberate delay by the Government. . . ." In its second opinion, on remand, the Court of Appeals stated: "There was testimony, however, by Agent O'Grady that during that period there was a reasonably active search for Campopiano. Judge Pollack credited this testimony and found that there was legitimate excuse for this delay." From a finding of no deliberate delay the Court of Appeals fell back on a finding by the trial Judge of a "reasonably active search." There is nothing in the record to indicate any finding of fact made by the trial Judge except to rule at the end of the Government's case that defendant had waived his right to a speedy trial. The Court of Appeals had abandoned this ground for affirmance and even conceded that the prosecution of this defendant would not meet its present guidelines for speedy trials.

Conclusion

Accordingly, for the reasons stated above this Court should grant certiorari to the United States Court of Appeals.

Respectfully submitted,

s/ Alfred E. Santangelo
SANTANGELO & SANTANGELO
Attorneys for Defendant-Appellant

Alfred S. Santangelo
Of Counsel

APPENDIX

Appendix A - Opinion of the Court of Appeals Decided March 20, 1973

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 164—September Term, 1972.

On Remand from the Supreme Court

(Submitted January 5, 1973 Decided March 20, 1973.)

Docket No. 71-1280

UNITED STATES OF AMERICA,

Respondent,

v.

JOHN CAMPOPIANO,

Appellant.

Before:

CLARK, *Associate Justice,**

SMITH, *Circuit Judge,* and ZAVATT, *District Judge.***

Appeal from conviction on trial to the jury in the United States District Court for the Southern District of New York, Milton Pollack, *Judge,* for violation of 21 U.S.C. §§ 173, 174. On remand from the Supreme Court.

Affirmed.

MICHAEL L. SANTANGELO, New York, New York (Santangelo & Santangelo, New York, N.Y.), *for Appellant.*

* Retired Associate Justice of the Supreme Court, sitting by designation.

** Senior District Judge for the Eastern District of New York, sitting by designation.

Opinion

WALTER J. HIGGINS, JR., Asst. U.S. Attorney (Whitney North Seymour, Jr., U.S. Attorney for the Southern District of New York, of counsel), *for Respondent.*

PER CURIAM:

Appellant's conviction for receiving, concealing and facilitating the transportation and concealment of heroin, knowing the same to have been illegally imported in violation of 21 U.S.C. §§ 173, 174 was affirmed by this court, 449 F.2d 869 (1971), *reh. denied,* January 13, 1972. Certiorari was granted by the Supreme Court on June 26, 1972, the judgment was vacated and the case remanded to this court for further consideration in light of *Barker* v. *Wingo,* 407 U.S. 514 (1972). Additional briefs have been received and further consideration had and the judgment of conviction is affirmed.

There were two periods of pre-trial delay in this case, nine months between the crime and the arrest, and twenty months between the arrest and indictment. The only basis for a claim of prejudice was in the alleged discarding of a diary during the earlier, nine-month period. There was testimony, however, by Agent O'Grady that during that period there was a reasonably active search for Campopiano. Judge Pollack credited this testimony and found that there was a legitimate excuse for this delay. This was a proper ruling under the standards set by *Barker* v. *Wingo, supra.* Where there was no deliberate attempt to delay the trial in order to hamper the defense, a period of nine months while attempts were being made to apprehend the defendant and make an arrest is justifiable here. During the second period of delay between arrest and indictment, defendant was free on bail and no prejudice was shown other than the anxiety and concern of an ac-

cused awaiting trial on a serious charge, as in *Barker's* case.[1] While such a delay would not meet our present guidelines for prompt processing of criminal prosecutions, the indictment came well within the period of limitations and we conclude that on balance such a delay should not invalidate the conviction. *Compare United States* v. *Marion,* 404 U.S. 307 (1971); *United States* v. *Feinberg,* 383 F.2d 60 (2d Cir.), *cert. denied,* 389 U.S. 1044 (1967).

Judgment affirmed.

1 We give no weight to any claim of waiver, since defendant moved to dismiss promptly after indictment.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1423

JOHN CAMPOPIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the indictment against him should have been dismissed because of a delay between the commission of the offense and arrest and delay between arrest and indictment.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of receiving, concealing and facilitating the transportation and concealment of heroin known to be illegally imported in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to five years' imprisonment. The court of appeals affirmed. 446 F. 2d 869 (C.A. 2). This Court granted certiorari (408 U.S. 915), vacated the judgment and remanded the case for further consideration in light of the Court's opinion in *Barker* v. *Wingo*, 407 U.S. 514. Additional briefs were filed in the court of appeals and after reconsideration the judgment of conviction was again affirmed (Pet. App. A.).

The facts relevant to the issue of delay are that the offense was committed on July 5, 1967, and the complaint was filed and a bench warrant issued for petitioner's arrest on July 6, 1967 (App. 18a).[1] Petitioner was arrested nine months later on April 8, 1968. The indictment was returned twenty-one months thereafter on January 12, 1970, and trial was commenced eleven months later on December 8, 1970. Petitioner's claim of delay relates primarily to the nine-month period between the commission of the offense and his arrest in April 1968. He asserts prejudice from this delay on the basis of a claim that he disposed of his personal business diary for the year 1967 during the first 60 days of 1968. He contends that this diary might have established his whereabouts on the date of the offense.

As the court of appeals found, evidence at trial showed that during this nine-month period a "reasonably active search" for petitioner was conducted. During this time, informants were questioned on numerous occasions (App. 24a-25a), wanted posters for petitioner's arrest were distributed to the New York City Police and the FBI (App. 25a-26a), and surveillance was conducted by agents of the Bureau of Narcotics and Dangerous Drugs of petitioner's residence and known haunts on at least fifteen different occasions (App. 140a-141a, 194a-195a). The agents testified that during this period of surveillance they did not knock on petitioner's door to inquire about him (App. 132a-133a, 141a-142a). When information was received that petitioner had returned from Florida shortly before April 4, 1968, he was speedily apprehended (App. 25a).

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[1] "App." refers to the appendix in the court of appeals on the original appeal, a copy of which is being lodged with the Clerk.

While petitioner's evidence raised a question of fact as to his presence during the period (App. 246a), the finding of the court of appeals that there was a "reasonably active search" for petitioner and that the delay was reasonable under the circumstances (Pet. App. 2b) is supported by the record.

Despite the filing of the complaint, petitioner was neither under arrest nor otherwise subjected to restraint during this nine-month period. This pre-arrest delay was the result of the government's inability to apprehend petitioner sooner despite reasonable efforts to do so. Thus, there was no denial of either due process or the right to a speedy trial. The Sixth Amendment's speedy trial provision does not apply to "the period prior to arrest." *United States* v. *Marion*, 404 U.S. 307, 321. And, while the government conceded in *Marion* that the Fifth Amendment "would require dismissal of the indictment if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice to [a defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused" (404 U.S. at 324), no such showing has been made here. Indeed, even under the Sixth Amendment standards of *Barker* v. *Wingo, supra*, the possible prejudice from the claimed disposal of the business diary here is not sufficient to overbalance the reasonableness of the delay.

Petitioner also claims that he was prejudiced because the complaint filed in July 1967 charged that he and another were in possession of the heroin, while the indictment omitted the reference to the other person and charged petitioner alone. This claim apparently relates to the period between petitioner's arrest in April 1968 and the return of the indictment in January 1970.

The complaint, however, merely serves as a basis for the issuance of the warrant of arrest. Since there is no claim here that the arrest itself was invalid or that any evidence produced incident to the arrest was used at trial, petitioner's claim that the complaint was incorrect in this respect is immaterial. Since petitioner raises no other claim of specific prejudice attributable to the delay between the arrest and the indictment, and since there is no allegation that the government purposely caused this delay to obtain an advantage over petitioner, the court of appeals correctly applied the standards of *Barker* v. *Wingo* in upholding petitioner's conviction.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

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[2]Since the record contained the facts required by the court of appeals to apply the standards of *Barker* v. *Wingo*, there is no merit to petitioner's suggestion that the case should be remanded to the district court for further consideration.

DOJ-1973-07